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IN THE

Supreme Court of the United States

October Term, 1936.

No. 125

A. L. SHAPLEIGH, et al.,
Petitioners,

vs.

PASCUAL MIER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The memorandum decision (unreported) of the District Court of the United States for the Western District of Texas is in the record at page 428. The findings of fact and conclusions of law are in the record at page 434. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, (R. 456) is reported in 83 Federal (2nd) 673.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 21, 1936. (R. 468) Petition for certiorari was

filed June 19, 1936. Certiorari was granted October 12, 1936. (R.....) Jurisdiction is conferred on this court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the expropriation proceeding valid whereby the Governor of the State of Chihuahua, Mexico, took from plaintiffs their land there located, valid record title to which the District Court held was at the time in them, a portion of such land being afterward shifted into the United States by an avulsive change in the course of the Rio Grande, constituting the boundary between the two countries, and being here the subject of controversy?

2. Could the Governor of the State of Chihuahua, Mexico, lawfully take from American owners their land located in that State, without indemnification?

3. Could the Governor of the State of Chihuhua, Mexico, lawfully convey title to land which, at the time of the attempted conveyance, was in the United States?

STATEMENT OF THE CASE.

This is a suit in trespass to try title filed April 4, 1933, wherein the plaintiffs (here the petitioners) seek the recovery of a tract of land known as El Guayuco Banco, located in Hudspeth County, Texas, about seventy miles from El Paso, and about ten miles from McNary, a station on the Southern Pacific Raliroad, containing 136.6 hectares, or 337.6 acres. (R. 1.)

Plaintiffs contend that El Guayuco Banco was cut from Mexico by an avulsive change in the course of the Rio

Grande sometime in the year 1926, as found by the International Boundary Commission by its Minute No. 121, promulgated March 3, 1930, (R. 9) and that it was cut from La Santisima, a tract of about ninety-five thousand acres to which plaintiffs had title by a chain beginning by confirmation by the President of Mexico in 1864, of a grant by the Legislature of the State of Chihuahua in 1859 to Laureano Munoz (R. 19) and running down to a deed dated February 13, 1897, by Bennett H. Davis to A. L. Shapleigh, Charles H. Peck and Thomas Ranken, Jr. (R. 114). In addition, plaintiffs pleaded the Mexican Statute of Limitations of ten years in good faith, and twenty years in bad faith. (R. 423.) The documents going to make out plaintiffs' title are described in their abstract as follows:

1. Minute No. 121, International Boundary Commission, dated March 3, 1930.
2. Report of Engineers of International Boundary Commission, dated February 24, 1930.
3. International Boundary Commission map of El Guayuco Banco.
4. Document dated November 29, 1864, whereby President of Mexico ratified in Laureano Munoz title of ownership of La Santisima.
5. Deed of sale of La Santisima by the heirs of Laureano Munoz to Ignacio Macmanus, dated June 1, 1886.
6. Document showing recording in Juarez, Chihuahua, Mexico, June 10, 1886, of sale of La Santisima by the heirs of Laureano Munoz to Ignacio Macmanus.
7. Instrument of sale dated December 6, 1886, conveying La Santisima from Ignacio Macmanus to Bennett H. Davis.
8. Document showing recording in Juarez, Chi-

huahua, Mexico, May 10, 1887, of sale of La Santisima by Ignacio Macmanus to Bennett H. Davis.

9. Releases and acknowledgment of satisfaction of mortgages on La Santisima.

10. Deed dated February 13, 1897, whereby Bennett H. Davis conveyed La Santisima to Alfred L. Shapleigh, Charles H. Peck, and Thomas Ranken, Jr.

11. Deed dated January 2, 1924, confirming sale by Ignacio Macmanus to Bennett H. Davis and describing La Santisima by metes and bounds.

12. Will of Charles H. Peck.

13. Decree of Circuit Court, St. Louis, Missouri, probating will of Charles H. Peck, and appointing as Trustees, Stephen Peck, John A. Peck, Rebecca Dusenbery, and Belle Peck Bryant.

14. Appointment of Claude B. Ricketts and Charles J. M. Donaldson Trustees in place of Stephen Peck.

15. Appointment of Elizabeth P. Peck and Max M. Bryant as trustees in place of Claude B. Ricketts and Charles J. M. Donaldson.

16. Certificate of death of John A. Peck.

17. Statement of devolution of title to interests of Thomas Ranken, Jr., in La Santisima.

18. Will of Hugh R. Lyle, Deceased.

19. Letters Testamentary to Mississippi Valley Trust Company.

20. Certificate of incorporation of the Mississippi Valley Trust Company, St. Louis, Missouri.

21. Permit for Alfred Lee Shapleigh, Charles H. Peck, Thomas Ranken, Jr., et al, to own property in Mexico.

22. Mexican Statute of Limitation.

Defendant's title is based on a proceeding whereby the Governor of Chihuahua on March 5, 1925, undertook to expropriate La Santisima (R. 253) and an instrument dated February 20, 1930, whereby the Governor of Chihuahua attempted to convey El Guayuco Banco to the defendant. (R. 276.)

Defendant went to trial on an answer filed August 30, 1933, consisting of a general demurrer and a plea of "Not Guilty". (R. 6.) He also filed an abstract of title, and a brief description of the documents on which he relies is as follows:

1. The Decree of Expropriation by the Governor of Chihuahua March 5, 1925, of the latifundium composed of part of the tract known as La Santisima, and other tracts.
2. The Deed from the Governor of Chihuahua to the defendant, dated February 20, 1930, purporting to convey, among other properties, El Guayuco Banco.
3. A map of El Guayuco Banco.
4. A document dated February 17, 1930, whereby the Governor of Chihuahua undertook to give possession to the Defendant of El Guayuco Banco, among other properties.
5. Correction Deed dated May 20, 1930.
6. A map of La Santisima signed by M. Contreras, Jr., December 5, 1929.
7. Minute No. 121, International Boundary Commission, dated March 3, 1930.
8. Report of Engineer of International Boundary Commission, dated February 24, 1930.
9. International Boundary Commission map of El Guayuco Banco.

10. Defendant's application to acquire a portion of La Santisima, dated March 14, 1925.

11. Answer of the Governor of Chihuahua to Defendant's application to acquire a portion of La Santisima, dated April 15, 1925.

A stipulation in writing waiving a jury was filed.

The District Court found that plaintiffs had good record title to the tract of land located in the State of Chihuahua, Mexico, known as La Santisima, when the Mexican Constitution providing for an agrarian law and expropriation proceedings was adopted on May 1, 1917 (R. 434); that the plaintiffs never had title by limitation (R. 440); that the expropriation proceedings culminating in the decree of the Governor of Chihuahua of March 5, 1925, were valid and deprived plaintiffs of their title (R. 438); that the petition of the defendant, dated March 14, 1925, directed to the Governor of the State of Chihuahua asking that he be awarded a portion of the tract called La Santisima created a vested interest in the applicant (R. 440); that the portion of La Santisima called El Guayuco Banco was cut from Mexico to the United States some time in the year 1926 (R. 437); and it was the judgment of the court that the plaintiffs recover nothing, and the defendant go hence (R. 433).

The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the district court. This court is asked to reverse the judgment in favor of the defendant and render judgment in favor of plaintiffs.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that the District Court correctly directed judgment for the defendant.

2. In holding that the expropriation proceeding of the Governor of Chihuahua, Mexico, was effective to divest plaintiffs of their title to the land in question.

3. In holding that plaintiffs could lawfully be deprived of their Mexican land without indemnification.

4. In holding that the Governor of Chihuahua, Mexico, could lawfully convey to the defendant title to land located in the United States at the time of such attempted transfer.

5. In holding that in a suit to recover title to and possession of land now in the United States, formerly in Mexico, plaintiffs' only remedy is a suit in the Courts of Mexico for compensation for the loss of the land.

6. In holding that the Courts of the United States may not inquire into the validity of a Mexican expropriation proceeding whereby American citizens are deprived of their Mexican land without compensation.

7. In holding that in a tresspass to try title suit such as this, the validity of plaintiffs' title is ever relatively unimportant, because if the defendant should prove to be a trespasser the plaintiff may recover on a mere showing of prior possession.

8. In holding the principle that the law goes with the land when it is transferred from one sovereignty to another has no application to the transfer by the movement by the river of a few acres of land from one soverignty to another.

9. In holding that the Mexican Law and its application to this case was a question of fact and rightly disposed of as such by the District Judge.

10. In holding that land located in the United States may be recovered by diplomatic proceedings.

11. In holding that the defendant connected himself with the title of the State of Chihuahua to the land in question by an inchoate grant.

SUMMARY OF ARGUMENT

The land here involved was originally in Mexico. The plaintiffs had valid legal title to it from the sovereignty of the soil under the laws of Mexico at the time of the adoption in 1917 of the Mexican Constitution providing for agrarian laws and expropriation proceedings thereunder as found by the District Court. Some time in the year 1926, the land in controversy was cut from Mexico to the United States by an avulsive change in the course of the Rio Grande, the stream then constituting the International Boundary Line as found by the International Boundary Commission. The attempted transfer by the Governor of the State of Chihuahua of the land in controversy to the defendant was null and void and of no effect because the expropriation proceeding constituting the sole source of title of the Governor was null and void and of no effect for the reason that the land so sought to be appropriated was never paid for and payment was never tendered, such attempted expropriation without payment being contrary to established custom and International Law, contrary to the provisions of the Mexican Constitution, and contrary to the provisions of the Statute of the State of Chihuahua then in force. The attempted expropriation was null and void for the further reason

that the Mexican Constitution provides that land may be taken from the owner only through court process, and the Governor was no Court. The holdings of the plaintiffs were not subject to expropriation, not being in an excessive acreage under the provisions of the Mexican Law; and their holdings were further not subject to expropriation because under the provisions of the Mexican Law only the excess above the amount authorized to be held may be expropriated, and the holdings of the plaintiffs did not exceed that amount. The attempted transfer by the Governor to the defendant was null and void for the additional reason that at the time of such transfer, the land in controversy was in the United States and all Mexican authorities were without a vestige of right to do anything affecting the land. The District Court was in error in holding that it was bound by the interpretation given to the Mexican Constitution and Mexican Laws by the Mexican Courts, and in interpreting the law to justify expropriation without payment for the land taken; and the Circuit Court of Appeals erred in holding that under the circumstances of this case it was bound by the act of a foreign government with reference to land then located within its limits, and by holding that it, the Circuit Court of Appeals, was bound by the finding of the District Court as to the meaning of a foreign law, and by holding that in this case the foreign law justified the taking of plaintiff's land without compensation.

ARGUMENT.

Our main reliance for a reversal of this case is quite simple. Mexico took our land and never paid us; therefore, we never lost title and Mexico had no title to convey to the defendant. The process by which we lost our land was plain governmental theft.

Plaintiffs contend they have valid title to El Guayuco Banco, the land in controversy, because it was cut into the United States from their Mexican land holdings known as La Santisima by an avulsive change in the course of the Rio Grande, some time in the year 1926 (R. 437), and because in 1897 they acquired title to La Santisima, which title ran back to the sovereignty of the soil, beginning with a concession by the Legislature of the State of Chihuahua in 1859, and a confirmation by the President of the Republic of Mexico in 1864. (R.434.)

The trial court held that plaintiffs had valid record title to the land in controversy on May 1, 1917, the date of the adoption of the Mexican Constitution, providing for Agrarian Laws and expropriation proceedings (R. 434); that said land was cut from the south, or right bank of the Rio Gande, to the north, or left bank of the Rio Grande, by an avulsive change in the course of the Rio Grande in the year 1926, and that it is now in the United States. (R. 437.)

The title of the defendant rests on an expropriation proceeding whereby the Governor of the State of Chihuahua deprived the plaintiffs of the posssion of La Santisima (R. 253) and an instrument whereby the Governor attempted to convey to defendant title to a portion thereof, known as El Guayuco Banco (R. 276). Defendant has not appealed from the finding that plaintiff had valid record title to the property in controversy prior to the institution

of the expropriation proceeding. It inevitably follows that if there was a fatal defect in the expropriation proceeding, plaintiffs never lost title to the land in dispute, and that they still have it and if there was a fatal defect in either the expropriation proceeding or the instrument of conveyance, defendant never got title and does not now have it. It is the contention of the plaintiffs that both were fatally defective.

First, plaintiffs never lost title because they were never paid for their land.

Trial court made the following finding:

> "The Constitution of 1917 and the Agrarian Law of the State of Chihuahua do not require that compensation be paid prior to, or at the time of the expropriation or taking of land by the State, or that payment for same be then provided for." (R. 436.)

Taken literally, it is reversible error. Besides, the effect of it is to hold the land need never be paid for. If payment of the land is not required to be made or guaranteed at the time of expropriation, then why may payment not be indefinitely deferred and never be made? That seems to be the holding of the court, since the uncontradicted evidence shows that at the time of the trial, almost ten years after the expropriation, no payment had ever been made or tendered. (R.382-387.)

The taking of the land of the plaintiffs without paying for it is contrary to the principles of International Law and established custom.

International Law is a part of the law of the land. *Moore: International Law Digest,* Volume 1, page 10; *The Nereide,* 9 Cranch 388. The rights of aliens in Mex-

ico to real property is a subject of international law. By that law, a citizen of the United States cannot be deprived of property without due process of law, which requires the payment of just compensation. The attribute of sovereignty by virtue of which a nation takes private property for public use is known as "eminent domain". Vattel, in his *"Law of Nations"*, Chitty's Edition, Book I, Chapter 20, page 112 states:

> "If the sovereign disposes of the public property by virtue of his eminent domain, the alienation is valid as having been made with sufficient power. When, in case of necessity, he disposes in like manner of the possessions of the community or an individual, the alienation will, for the same reason, be valid. But justice requires that this community or this individual, be indemnified at the public charge; and if the treasury is not able to bear the expense, all the citizens are obliged to contribute to it; for the burdens of a state are to be supported equally, or in a just proportion."

In *Meade vs. United States* (2 United States Court of Claims Reports, pages 224, 275) it was held:

> "The right of the government to take for public use or public welfare the property of a citizen by virtue of the right of eminent domain, and the obligation to make compensation to the citizen for it, are universally admitted as concurrent and correlative powers and duties. They are co-existent and co-extensive."

The text writers on the subject lay down the same doctrine. *Mills on Eminient Domain,* Section 130 says:

> "Payment must be made before entry, where the owner insists on this right. An entry without payment is a trespass."

Lewis on Eminent Domain, Third Edition, Section 681, says:

> "Any interference with the rights of property is a taking. The occupation of property is clearly such an interference, and should not be permitted until the compensation is paid."

The general and established practice is obviously the same.

> "It has long since become the well settled rule that property cannot be taken for public use without adequate compensation, even on the theory that it has been abandoned by the owner."

10 R. C. L., p. 124.
Pumpelly vs. Canal Co., 13 Wall. 166, 20 L. Ed. 557.
Garrison vs. New York, 21 Wall. 196, 22 L. Ed. 612.
United States vs. Great Falls, 112 U. S. 645, 5 Supreme Court 306, 28 L. Ed. 846.
Great Falls vs. Garland, 124 U. S. 581, 8 S. Ct. 631, 31 L. Ed. 527.
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Bauman vs. Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270.
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"Any statute is unconstitutional which enables the donee of the power of eminent domain to take property without first paying compensation therefor in money."

16 Tex, Jur., p. 573.
Mud Creek Irr. etc. Co. vs. Vivian, 74 Tex. 170, 173, 11 S. W. 1078.
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It will thus be seen that International Law and Established Usage are in accord and forbid the taking of private property for public use without compensation.

The Expropriation of El Guayuco Banco was in violation of the Treaty between the United States and Mexico.

The Government of Mexico, in entering into the Treaty of September 8, 1923, with the United States, recognized the rights of American citizens to receive just compensation for property expropriated before they could be divested of their legal titles.

By Article IX, second paragraph, of the Convention creating the General Claims Commission, it was provided:

> "In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made, as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant. In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property or right shall be

> paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately."

This recognized, therefore, the right of the claimant, the plaintiff in the present case, to have his land back, unless Mexico elected to pay for it, in which case payment had to be immediate.

In *San Lorenzo Title and Improvement Company vs. Caples,* 48 S. W. (2d) 331, a case involving a banco, the Texas Court of Civil Appeals said:

> "Treaties are the supreme law of the land, and the courts must take judicial knowledge thereof and of the historical data leading up to them, as well as the construction of them by both the executive and judicial branches of the government."

The proceedings leading up to the conclusion of the above treaty, referred to as "Bucareli Conference", are contained in an official publication of the Department of State, entitled "Proceedings of the United States-Mexican Commission Convened in Mexico City, May 14, 1923." (Washington Government Printing Office, 1925). At the formal meeting of June 1, 1923, Commissioner Warren is reported as making the following statements:

> "Then Mr. Warren turned to page 53 of Mexican Document No. 1 and quoted from a communication dated March 31, 1923, which Mr. Pani, Secretary of Foreign Affairs, sent to the charge d'affairs of the embassy of the United States in Mexico, reading as follows:
>
> " 'This Administration succeeded in quelling such centers of rebellion and in re-establishing peace throughout the national territory, not so much by military force and bloodshed as by the quick application of agrarian laws. Nobody doubts that, facing such dilemma, the adopted solution was the most

humanitarian and economic one—in spite of the inevitable damage to individual national and foreign agricultural interests—because the repression by force, of uncertain and transitory results, would have affected necessarily the agricultural, urban, industrial and moral interests throughout the country, with its eternal trail of evils of every kind. This undoubted fact sufficiently justifies the hasty action of the Federal Executive to restitute or grant community lands *(ejidos)* to the villages, taking the necessary lands from the neighboring farm *(haciendas)*, even postponing the indemnity for expropriations and encumbering, consequently a part of the national and foreign agricultural interests of the Republic; but in proportion to their respective size, that is to say, the Mexican properties infinitely more than the Spanish, the latter four or five times more than the American, etc. Naturally, due to the haste with which the Government has had to act in order to be sure to obtain the immediate pacification of the country and to avoid the greater and really irreparable damages caused by civil war, it could not efficiently organize the necessary personnel. It must be remembered, in this connection, that the imperfect administrative organization is an evil found now among the most civilized countries of the world and that this evil had to increase in Mexico, as a result of the last year's revolutionary anarchy. And in the face of the popular eagerness for lands, which was repressed, for a long time, the noble enthusiasm of some *agraristas*, and the intrigues of political agitators who found a favorable field to act, it was not possible, on many occasions, for the Government to keep within the strictest legality.'

"Mr. Warren then took up some specific cases of excesses in respect to American property, after which he added that it was perhaps unnecessary to call attention to other specific cases where excesses had been committed under color of law, but that there was in the files of the Department of State of

the United States and in numerous communications received by the American Commissioners ample evidence of the taking of property, both buildings and the land, contrary even to the provisions of the laws and the decrees of Mexico without any reference to the acquired rights of American citizens and their rights under international law.

"He then stated that the United States maintains that under the rules of international law there can be no taking of lands, water rights or other property of American citizens, in whatever form their interest may be held, legally acquired prior to May 1, 1917, under the laws of Mexico and the Constitution of 1857, without indemnification in cash at the time of the taking for the just value thereof. (Italics ours.)

"He stated that the Government of the United States understood that the division of estates or lands by the Federal Government or by any state government and the payment for any part thereof in bonds, whether federal or state, was in no way connected with the taking of lands for *ejidos* for towns and villages. And he added that the United States could not admit the assertion of the Government of Mexico to the right to declare null and void valid titles to properties or property rights acquired by American citizens or to make grants thereof based on the existence of ancient grants or concessions or communal possession.

"It was further stated by Mr. Warren that Mr. Pani, in the note just referred to, states that the Mexican Government is now in a position to proceed to the legal indemnity for the expropriations that have taken place. He then said that the United States cannot recognize any right of Mexico under the terms of any law, as a legal right, to pay in bonds or to compel American citizens to accept bonds as compensation for land, in whatever form their in-

> terest may be held, which has been or may be expropriated for *ejidos* for towns or villages. He added that the indemnity which the Government of the United States believes Mexico should pay for these lands is their just value in cash at the time of the taking; and that bonds, not immediately convertible into money on the basis of their par value and acceptable to the owner of the land, can in no way be considered as indemnification under the Constitution of 1857 or under the rules of international law. By paying in bonds, he added, not only is Article 27 of the Constitution of Mexico of 1857 violated, but the principles established by international law are also violated."

The lands of the present plaintiff, having been acquired in 1897 when the Mexican Constitution of 1857 was still in effect, come within the language used by Mr. Warren in the passages quoted above.

Article 27 of the Mexican Constitution of 1857 provided (R. 397):

> "Private property shall not be taken without the consent of the owner, except for reasons of public utility, indemnification having been made. The law shall determine the authority to make the expropriation and the conditions on which it shall be carried out."

It is clear from the foregoing, that indemnification must accompany or precede the expropriation. The present plaintiffs, therefore, had acquired a vested right or title of which they could not be deprived under the retroactive application of any subsequent laws purporting to divest owners of their title to the property.

The failure to pay plaintiffs for their land taken was in violation of the provisions of the Mexican Constitution.

It seems to us that plaintiffs' rights should be determined by the provisions of the Mexican Constitution of 1857, since it was in effect at the time plaintiffs acquired title to the property in dispute in 1897. Article 27 of that Constitution provides that private property shall not be taken without the consent of the owner, "*indemnification having been made*". (R. 397.) There can hardly be a shadow of a doubt that such language means previous payment, and that the owner does not lose his title until he gets his money. But if the court should hold that we are to be governed by the provisions of the Constitution of 1917, the result would be the same. There is no substantial difference in the two constitutions in this respect. The Constitution of 1917, Article 27, says (R. 401):

> "Private property shall not be expropriated except for reasons of public utility and *by means of indemnification.*"

The delicate distinctions in time of payment for appropriated land discussed by defendant at the trial seem idle, when it is considered that almost ten years have gone by since the expropriation in this case, and no payment has been made or tendered. (R. 382.)

Defendant calls attention to the fact that the Constitution of 1857 required *previous* indemnity and the Constitution of 1917 said, "*by means of indemnity*", and he says the change is significant.

We think it was probably inadvertent. There is no substantial difference. Measured in terms of time, there would not be an appreciable difference. "By means of *in-*

demnity" certainly means that titles cannot be passed until there has been indemnity. How much sooner would *previous* indemnity be paid? If the framers of the Constitution of 1917 had intended to change the policy, it would have been a simple matter to have left no doubt about it, and to have said that expropriation should be by means of credits extended or guarantees given, instead of by means of indemnity. Indemnity, whether preceded by the word "previous", or the words "by means of", of necessity mean practically simultaneous payment, otherwise it isn't indemnity.

That both constitutions require indemnification before title passes, seems too clear to need the aid of construction. And American courts will do their own interpreting of a foreign law, not being bound by that of any foreign court. *Bank of China, etc., vs. Morse,* 168 N. Y. 458, 56 L. R. A. 139 (New York Court of Appeals). Nevertheless, our view is fortified by the fact that the Supreme Court of Mexico has held that the provisions of the Mexican Constitution relating to the taking of private property for public use means precisely what we contend they mean. Attached hereto as an appendix, is a copy of an opinion of the Supreme Court of Mexico on an appeal from the District Court of the State of Durango, in a case wherein Pastor Moncada, widow of Blanco Teodora, was plaintiff, and the Legislature and Governor of the State of Durango were defendants. That decision conclusively established that regardless of the general value of Agrarian Law, and regardless of the general rule as to whether indemnification for expropriation of land must be previous, simultaneous, or subsequent, or may be never, as contended by defendant, the Law of Mexico is that expropriation and indemnification must be simultaneous.

The opinion in the *Durango case* says this:

> "The second point of the complaint is made to consist of the fact an expropriation is tried to be made against the plaintiff, without payment of the indemnity referred to by Article 27 of the Federal Constitution."

That is our case exactly. Surely the mere recital in the expropriation decree involved in our case, that bonds shall issue, cannot take the place of actual payment. The opinion then proceeds:

> "It is true that this article provides that the expropriation can only be made by reason of public utility, and through indemnity. In what respects to this last requirement, it should be said that, even although Article 27 does not require previous indemnity, it does not provide that it can be postponed; hence logically and juridically speaking, it must be inferred that the expropriation and indemnization should be simultaneous;"

In view of this language, it is difficult for us to see how it can be contended that the opinion was based on a lack of showing of public utility, and does not decide the question of indemnity as argued by the defendant at the trial. The opinion then says:

> "and even in the wrong supposition that the latter could be postponed, it is evident that it had to be guaranteed in a precise, real and positive manner, since without these requirements, such expropriation would amount to despoliation, and our Magna Charta does not authorize such an outrage."

If the failure to guarantee constituted an outrage, then how much greater the outrage when there has been an absolute failure to pay over a period of ten years.

The proceeding in our case was in no sense a true ex-

propriation; it was an unlawful appropriation, a species of despoliation as defined by the Supreme Court of Mexico in the *Durango case.*

Moreover, since the courts below were entirely independent in interpreting a foreign constitution, they should have found this Court more pursuasive than any other authority.

The provision of the Indiana Constitution construed by the Supreme Court of the United States in *Kennedy vs. Indianapolis, supra,* is substantially the same as the provision of the Mexican Constitution here involved. It provided that no man's property should be taken or applied to public use, "without the consent of his representatives, or without a just compensation being made therefor".

It will be observed the organic law did not specifically state whether indemnification should be previous, simultaneous, or subsequent. This court said:

> "It seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete, as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him."

A Statute of the State of Chihuahua forbids expropriation without compensation.

Article 736 of the Civil Code of the State of Chihuahua, in force at the time of the attempted expropriation of our lands by the Governor, reads as follows (R. 91):

> "The property of any person cannot be occupied without the consent of the owner unless by cause of public utility and previous indemnification."

This point is probably unimportant except that a certain situation would arise which seems to us practically impossible, namely that this Court should hold expropriation without indemnification in harmony with the Mexican Constitution. In that event the taking of our land would still be in violation of the State Statute and surely, it cannot be contended that the Mexican Constitution forbids such a statute. If this Court should hold that the taking of our land without paying for it is in violation of the Mexican Constitution, the fact that it is also a violation of a Mexican State Statute simply emphasizes the rape of the plaintiffs.

Giving the most liberal interpretation to any authority that may be cited by defendant, it is confidently believed that no case can be found in the books which goes further than to hold that in the absence of payment of cash at the time of expropriation, there must be at least a guarantee of payment and if actual payment be not made within a reasonable time, title reverts to the owner. In this case there was no guarantee, and surely plaintiffs could not be expected to wait longer than ten years to get their title back, if they ever lost it.

The expropriation proceeding and the Agrarian Law purporting to authorize it were null and void and of no effect.

In the first place the Governor was without authority to conduct an expropriation.

The applicable provisions of the Mexican Constitution of 1857 and 1917 are as follows, respectively:

"No retroactive law shall be enacted. No person shall be tried or sentenced except under laws previously enacted, exactly applicable to the case, and by a tribunal previously established by law." (R. 397.)

"No person shall be deprived of life, liberty, property, possessions or rights without due process of law instituted before a duly created court, in which the essential elements of procedure are observed and in accordance with previously existing laws." (R. 399.)

The provision in the constitution of 1917 against deprivation of property, except by a court, is new. The Governor of Chihuahua is no kind of a court; therefore, he exceeded his authority.

The Agrarian Law (R. 329) claimed by defendant to be authority for the expropriation by which he gained title, was null and void and of no effect. As heretofore pointed out, the Mexican Constitution requires that owners of private land taken for public purposes shall be indemnified. The Agrarian Law makes no provision for indemnification, which by any stretch of the imagination could possibly be distorted into the idea that it was adequate, and if not adequate, it cannot be indemnification.

The holdings of the plaintiff were not subject to expropriation under the Agrarian Law. It specifies the maximum amount of land of a certain type that may be held. The property of the plaintiffs did not exceed that amount. Mr. Gilberto Valenzuela, our expert on Mexican Law, explained this point quite clearly. (R. 91, 92.)

But in any event, the entire holdings of the plaintiffs were not subject to expropriation, only the excess above the amount allowed by law to be held. That only the excess is to be taken is iterated and reiterated in the Agrar-

ian Law. It appears on pages 329, 330, 335 and 337 of the printed record, and twice each on pages 331, 332, 333 and 334. In spite of the law, the Governor dispossessed the plaintiffs of their entire holdings. (R. 267.)

The expropriation proceeding under which defendant claims title, and by which, unless valid, plaintiffs do not lose title, culminates in a decree of the Governor of Chihuahua dated March 5, 1925. (R. 253.) That decree contains many recitals called findings, followed by several conclusions, and ends with four provisos that might be called mandates. The third of these mandates is as follows:

> "Indemnify the owners in the terms of subsection (d) of Section 7 of Article 27 of the Federal Constitution; and, once the Agrarian debt of the State has been created according to subsection (e) of the same section, deliver to them the corresponding bonds, for the purpose of guaranteeing the payment of the value of the expropriated latifundium." (R. 268.)

The entire expropriation proceeding by which plaintiffs were deprived of their land was invalid because the land was never paid for and the expropriation decree was invalid because the purported provision for payment is absurd. The foregoing quoted pretence at compensation is in itself a bald contradiction. It says to indemnify the owner in the terms of Article 27 of the Constitution, and to deliver to them the corresponding bonds upon creation of the Agrarian debt. It would be a physical impossibility to do both of these things at the same time. As we have seen, Article 27 of the Federal Constitution requires prompt payment, and the bonds are not to be delivered until the creation of the Agrarian debt, which may never be done. Moreover, bonds would not constitute indemnization under the provisions of International Law and the treaty, as has been heretofore pointed out.

As stated by the Circuit Court of Appeals for the Fifth Circuit in *Willis vs. First Real Estate and Investment Company,* 68 Fed. (2nd), 671:

> "The proceeding under which he (the defendant in this case) claims was a special one. No jurisdictional presumptions may be entertained in regard to it. The proof must show the jurisdiction. This is required of judgments and other official acts entered in special proceedings, even in domestic ones."

The expropriation decree of the Governor of Chihuahua was not a judgment of a court, but an ex parte administrative act. It was not a general law, but a special decree purporting to affect individual property. It was, therefore, a special proceeding, and must show compliance with the Constitution and the Special Laws governing such proceedings.

In view of the fact that the subject matter of this litigation was at one time in Mexico, and is now in the United States, and that while in Mexico, it was taken from the plaintiffs by what is claimed to have been a lawful proceeding, the test of the legality of that proceeding should be much like the test of the legality of a foreign judgment. On that point, Chief Justice Nelson Phillips of the Supreme Court of Texas in *Banco Minero vs. Ross,* 172 S. W. 711, 714, says this:

> "There is no difficulty, we think, in determining the general principles of law which govern the standing of a judgment of a foreign country in our courts. Where there is a competent court, jurisdiction of the parties and the cause, an opportunity for a full and fair trial, regular proceedings according to the course of a system of civilized jurisprudence, likely to secure an impartial administration of justice between the citizens of its own country and those of

> other countries, with nothing to show either prejudice in the court or in the system of laws, or fraud in the procurement of the judgment, and there is no special reason why the comity of the United States should not allow it effect, the merits of the case, in an action in this country, are not subject to retrial on account of errors of law or fact in the rendition of the judgment."

Since plaintiffs' land was taken without pay, it can hardly be said that it was done through "*regular proceedings according to the course of a system of civilized jurisprudence*".

The Mexican Government had no jurisdiction over the land at the time defendant alleges he acquired title.

The Boundary Commission's finding (Minute No. 121) of March 3, 1930, that Guayuco constituted a banco under the Treaty of 1905 (R. 9) has the effect of determining the sovereignty and jurisdiction either as of the date of the Treaty (1905) or as of the date on which the banco was cut (1926). In either case Mexico's sovereignty over the land had terminated before the expropriation proceedings attempting to divest plaintiffs of their title and to vest title in the defendant were completed.

> "If it was a true banco, after the signing of the treaty neither sovereignty could do any act affecting it to the prejudice of, or otherwise than in accordance with, the result which the application of the Treaty principles required. Any action taken thereafter by either government in the attempted assertion of jurisdiction over it other than by way of policing it, particularly by way of attempts to grant titles or disturb those already granted, could have no effect on it." *Willis vs. First Real Estate and Investment Company* (68 F. (2d) 671).

It is agreed that the banco was cut from Mexico some time in the year 1926, and that as soon as it was created sovereignty over it passed to the United States, so that the deed was executed four years after the banco had left Mexico and at a time when the Governor of the State of Chihuahua was without a vestige of authority to do any act affecting it. In an effort to cure this otherwise fatal defect, defendant claims that his rights under the deed began with the filing of his petition March 14, 1925, when the banco was in Mexico.

Both of his experts in Mexican Law make lengthy, complicated and tenuous arguments in support of the same and they contend that Article 46 of the Agrarian Law supports their theory. It is as follows (R. 344):

> "An application having been presented for a determined lot, no other shall be accepted applying for the same lot, until there shall have been pronounced a definite decision with reference to the first application. In case of there being presented several applications at the same time, the order of preference established by Article 51 shall be observed."

It is obviously inadequate for the purpose claimed. It simply gives to the person who files a petition to be awarded land, the right to have his petition considered before any petitions filed afterwards for the same land.

Defendant further contends that under the law of Texas, his deed would be effective as of the date of his application. His authority for the position taken is Article 5312, et seq., 15 Tex. Civ. St., 1925. It is true, as stated by defendant, that an application in Texas for a portion of the public domain, if accepted, becomes a conveyance, but that is wholly by reason of the specific provisions of the Texas statue. It provides that an application shall be in

the nature of a bid, and shall be accompanied by a certain proportion of the amount bid; that the land shall be awarded to the highest bidder, and the offer and acceptance together shall constitute a conveyance. The defendant then argues that in the absence of proof to the contrary, it will be presumed the law of Mexico is the same. But the trouble with the argument is that the defendant, himself points out the applicable Mexican law, which shows on its face that it does not remotely resemble the Texas statute. It merely provides that when application is filed, no other shall be considered until the first shall have been disposed of. The application conveys nothing and creates no rights; it is not in the nature of a bid, and never becomes a conveyance.

Furthermore, there is not the slightest intimation in any of the defendant's purported muniments of title or anywhere else in the record, that the parties to such instruments, intended that the deed to the defendant should have retroactivity or that his application should initiate in him any vested right. The application dated March 14, 1925 (R. 269) merely prays that defendant be considered an applicant for land, describing it so roughly that it is not susceptible of location. The so-called Executive Power, dated April 15, 1925 (R. 273) is merely a letter from a clerk advising that the Governor had received the application and that the rights thereunder would be determined upon the division of the latifundium. The deed dated February 20, 1930 (R. 277) which is much like an American deed, after some preliminary recitals, none of which insinuates retroactivity, says that the Temporary Constitutional Governor of the State of Chihuahua, in the name of the Government of said State, "*hereby adjudicates and sells to Pascual Carlos Mier*", the land therein described for a consideration in the sum of Two hundred and twenty-six pesos, six cents.

Another Executive Power, dated February 17, 1930, (R. 291) merely purports to place the defendant in possession of the land so attempted to be sold to him three days later. Defendant offers nothing else to show title in him, except a Correction Deed dated May 20, 1930 (R. 299). That instrument purports to do nothing except correct the description in the previous deed.

However, in connection with the last instrument, we wish to make this observation. It recites that the land thereby conveyed composed of the "Guayuco" and "Calero" bancos, on a recent date passed into the jurisdiction of the United States of America, by resolution of the International Boundary Commission, in accordance with the international treaty of 1905 between that country and the Republic of Mexico. So that in the event of a difference of opinion as to whether sovereignty over El Guayuco Banco passed in 1926 when it was created, or upon the promulgation of the resolution of the International Boundary Commission, March 3, 1930, the final step in its attempted sale to the defendant, the Correction Deed, was subsequent to either.

The correction deed, like the original deed, purported to be the act of the Government of the State of Chihuahua and it was executed when the banco was in the United States, and Mexico was without jurisdiction.

The Circuit Court of Appeals committed reversible error in holding that it could not inquire into the validity of the Mexican expropriation proceeding whereby the plaintiffs lost the land in controversy.

The Circuit Court of Appeals said that the Courts must treat as valid governmental action within its domain by a foreign state, and in support of that conclusion cited *Oetjen vs. Central Leather Co.*, 246 U. S. 297, and *Ricaud vs. American Metal Co.*, 246 U. S. 303. The holding in those cases is the law only in similar situations. In both cases the act, the validity of which the American Court declined to examine, was the act of the commander of a revolutionary force, while actually engaged in warfare, in making a seizure for the purpose of defraying the expense of further hostitities, the revolutionaries being afterward recognized as the government *de jure*, and the seizure made was authorized by the Articles of War, and it was not contended that there was any authority for it under the civil law. It is not believed this Court intended the doctrine there pronounced to be extended beyond the facts there found. The fact situation here is quite different from the one there involved. Here the seizure was made by a civil officer in time of peace, when the government was stable and under the guise of the authority of law and for the ostensible purpose of carrying out the provisions of the Mexican Constitution.

The Courts of the United States, both State and Federal, have many times examined the acts of foreign nations, and have frequently held them invalid in protecting the rights of American citizens abroad. For example, see the following cases:

United States vs. Arredondo, 6 Peters 691, 748;

United States vs. Percheman, 7 Pet. 117;
Delassus vs. United States, 9 Pet. 117;
United States vs. Reynes, 9 Howard 127, 148;
Davis vs. Police Jury, 9 Howard 280, 289;
United States vs. Sutter, 21 Howard 170;
United States vs. Rose, 23 Howard 262;
Donaldson vs. Dodd, 12 Tex. 381, 394;
State vs. Bustamante, 47 Tex. 320, 322;
Kenedy Pasture Co. vs. State of Texas, 111 Tex. 200, 230.

Even the validity of a foreign judgment will be examined by a local Court:

Hilton vs. Guyot, 159 U. S. 113, 40 Law Ed. 95;
Banco Minero vs. Ross, 172 S. W. 711;
San Lorenzo Title & Improvement Co. vs. City Mortgage Co., 48 S. W. (2nd) 310;
San Lorenzo Title & Improvement Co. vs. Clardy, 48 S. W. (2nd) 315;
San Lorenzo Title & Improvement Co. vs. Caples, 48 S. W. (2nd) 329;
Willis vs. First Real Estate & Investment Co., 68 F (2nd) 671.

The Court should bear in mind at all times that in this proceeding, plaintiffs are not seeking damages for the unlawful taking of their land. If that were so, possibly they would be relegated to the Courts of Mexico, or to an international claims commission. Certainly that would be their remedy if they were seeking damages for the unlawful taking of that part of La Santisima still remaining in Mexico. But that is not the situation. Here we are after the land itself, not damages; land that unquestionably is now lying in the jurisdiction of this Court.

It seems preposterous that defendant can set up as his sole source of title the expropriation decree, and in

the same breath say this Court cannot inquire into its validity because it is the work of a foreign nation. Defendant should be estopped to take that position; since he offers the expropriation decree, good faith requires that it should be subject to the scrutiny of the Court. If this proceeding were pending in Mexico, the expropriation decree would not be immune from attack.

The Circuit Court of Appeals committed reversible error in holding that it was bound by the Trial Court's interpretation of Mexican Law.

The Circuit Court of Appeals said:

> "We are of the opinion that the Mexican law and its application to this case was a question of fact and rightly disposed of as such by the District Judge, if he had any right to go into the question at all. We are bound by his findings."

It is well settled that foreign law must be proved as a fact, but it is consistent with the weight of authority that the interpretation of foreign law and its application to the facts of the case on trial are for the Judge and are matters of law, subject to review on appeal.

The New York Court of Appeals in *Bank of China, et al. vs. Morse,* 168 N. Y. 458, 56 L.R.A. 139, said:

> "That, when it becomes necessary to establish the law of a foreign country, it must be proved, as facts are proved, there is no doubt; but when, after such proof is given, the questions involved depend upon the construction and effect of a statute or judicial opinion, we think those questions are for the court, and not questions of fact at all."

The Court cited the following authorities:

Chase's Stephen, Ev. 146;
Hanley vs. Donoghue, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242;
Ufford vs. Spaulding, 156 Mass. 65; 30 N. E. 360;
Molson's Bank vs. Boardman, 47 Hun. 135; Story Confl. L. Sec. 638; 1 Greenl. Ev. Sec. 486;
Kline vs. Baker, 99 Mass. 253, 255;
Shoe & Leather Nat. Bank vs. Wood, 142 Mass. 563, 568, 8 N. E. 753.

Other authorities to the same effect are:

Inge vs. Murphy, 10 Ala. 885;
The State vs. Jackson, 13 N. C. 563;
Consequa vs. Millings, 6 Fed. Cases 336, 337 (Pet. C. C. 225, case No. 3128);
Williams vs. State, 11 S. W. 481;
Sidwell vs. Evans, 1 Pen. & W. 383, 21 Am. Dec. 387;
Alexander vs. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69;
Wheeler vs. St. Paul Crushed Stone Co., 191 Ind. 75, 132 N. E. 1;
Rood vs. Horton, 231 P. 450, 132 Wash. 82;
Fourth Nat. Bank of Montgomery, Ala., vs. Bragg, 102 S. E. 649, 127 Va. 47, 11 A. L. R. 1034;
Tarbell vs. Grand Trunk Ry. Co., 118 A. 484, 46 Vt. 170, 34 A. L. R. 1444;
Saloshin vs. Houle (New Hampshire), 155 A. 47;
Sealy vs. Missouri, K. & T. Ry. Co., 114 P. 1077, 84 Kan. 879, 41 L. R. A. (N. S.) 500;
Osgood Co. vs. Wilkinson, 191 N. E. 779, 265 N. Y. 70.

The only Federal case we have been able to find which seems to be to the contrary is *Compania Transcontinental de Petroleo, S. A. vs. Mexican Gulf Oil Co.* (C. C. A. 2nd) 292 Fed. 846, and in our opinion the doctrine there laid down is not supported by the authorities cited.

In an earlier part of the opinion of the Circuit Court of Appeals in this case, it said in speaking of the law of Mexico:

> "It remains for the law to be proved as a fact when written by production of copies of the constitution and statutes, and in other respects by the testimony of experts. The writings are to be construed by the Judge as other writings in evidence, but if uncertain in meaning or application, evidence of experts is again admissible to aid construction."

That statement of the law is not very clear, but it is more nearly correct than the statement previously quoted and which was followed by the Court. We believe that the cases cited by the Circuit Court of Appeals in connection with the foregoing quotation support our contention that the interpretation given by the Trial Court to foreign constitutions and statutes is matter of law subject to review on appeal. The cases are as follows:

The Amelia, 1 Cranch 1;
Pierce vs. Indseth, 106 U. S. 551;
Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S. 445;
Slater vs. Mexican National R. R. Co., 194 U. S. 121.

In each of the foregoing cases, the Appellate Court gave its own interpretation to the foreign law involved.

And it was fundamental error for the Circuit Court of Appeals to hold the principle that the law goes with the land when it is transferred from one sovereignty to another has no application to the transfer by the movement of the river of a few acres of land from one sovereignty to another.

Spanish laws prevailing in Louisiana before its cession and affecting titles to land there, *must be judicially noticed* by the Court. *Their existence is not matter of fact to be tried by a jury. U. S. vs. Turner*, 11 Howard 663; *U. S. vs. Chavez* (1895) 159 U. S. 452, cited in Moore, Int. Law Digest, I, 333.

Grants made by the Spanish authorities in territory which, upon the subsequent settlement of a disputed boundary line, was determined to belong to one of the United States, are void. *Robinson vs. Minor,* 10 Howard 627, cited in Moore's Int. Law Digest I, 746.

The provision in a treaty that the inhabitants of a ceded territory shall be protected in the free enjoyment of their property, does not extend to mere *inchoate* rights which are of imperfect obligation and affect only the conscience of the new sovereign. *Dent vs. Emmeger,* 14 Wall. 308.

Under the doctrine of the Fremont Case *(Fremont vs. United States,* 17 Howard 442, 15 L. Ed. 241), the laws of Mexico in regard to the tract here in controversy are not regarded as the laws of a foreign nation, but as domestic laws.

Since the land in dispute was in Mexico at the time of the adoption of the Agrarian Law, and while the expropriation was proceeding, this Court would scrutinize them and pass on their validity, not as the acts of a foreign nation, but as domestic acts, because at the time the acts were done by Mexico, the tract in question was not foreign to Mexico, but was a part of it.

The plaintiffs in this case have no remedy but in this Court under the Universal Rule that title to land can be adjudicated only in the forum of the situs.

It is the contention of the plaintiffs that El Guayuco Banco was cut from La Santisima; that A. L. Shapleigh, Charles H. Peck and Thomas Ranken, Jr. acquired valid and legal title to La Santisima by the Deed of February 13, 1897, from Bennett H. Davis, as well as by prescription under the provisions of the Mexican Statute of Limit-

ation, and that there has never been any divestiture of such title. Therefore, El Guayuco Banco is now owned by A. L. Shapleigh and the heirs or legal representatives of Charles H. Peck and Thomas Ranken, Jr.

That the proof abundantly establishes the rights of A. L. Shapleigh admits of no doubt. The rights of the Plaintiffs who sue as heirs and legal representatives of Charles H. Peck are also well established. If the Court should entertain any doubts that the Plaintiffs who sue as the heirs of Thomas Ranken, Jr., have established their rights in that capacity, it would not affect the rights of the other plaintiffs, and would not affect their right to recover the entire tract in controversy, since each individual plaintiff sues as a tenant in common, and seeks the recovery of the entire tract for himself.

The law applicable to the situation is as follows:

Trespass to try title can be maintained by a tenant in common without joining his co-tenants. *Carley vs. Parton,* 75 Tex. 102, 103; 12 S. W. 950.

All tenants in common need not join in trespass to try title. *Leland vs. Eckert,* 81 Tex, 229, 230; 16 S. W. 897.

Trespass to try title by one plaintiff in the name of other owners held proper. *Robertson vs. Lee,* 249 S. W. 217, affirming 230 S. W. 730, where it is said that: Testimony that purchaser at foreclosure sale purchased one-fifth interest for another held available to prove such other person's interest.

The general rule that all persons having an interest in a litigation should be made parties is subject to exceptions, and where the claimants in trespass to try title against an acknowledged co-tenant are numerous, and it appears that possibly some of those who, under plaintiffs' theory of the case, are entitled to recover reside in another

state, they may be disregarded, and plaintiffs may proceed to judgment for their own interest in the land. *Hess vs. Webb*, 123 S. W. 111; 103 Tex. 46.

Judge Gaines, in *Boone vs. Knox*, 80 Tex. 642, 644; 16 S. W. 448, said: "The true principle would seem, however to be that each tenant in common is entitled to the enjoyment of the entire premises undisturbed by any one except his co-tenants, and therefore it is proper that he should have the right to dispossess a stranger to the title."

Syllabus, *Humphreys vs. Green*, 271 S. W. 116: "Where jury in trespass to try title found that plaintiff's ancestor had never conveyed the land in controversy to defendant's grantor, the defendants were therefore trespassers, and heir as tenant in common could recover the entire interest in land against defendants."

"The general rule is that one of several tenants in common may maintain an action to recover the whole of the land from a person having no title." Judge Walker, in *Taylor vs. Higgins Oil & Fuel Co.*, 2 S. W. (2d) 288, 296. Same opinion says: "Again in *Keith, v. Keith*, 39 Tex. Civ. App. 363, 87 S. W. 384, and *Hooper v. Hall*, 30 Tex. 158, the question was decided on the proposition that one co-tenant may maintain an action for posession against a trespasser, and the recovery inures to the benefit of the other co-tenants." The same opinion further says: "In *McDonald v. Hamblen*, 78 T. 628, 14 S. W. 1042, it was held in trespass to try title by a co-tenant against one claiming adversely under a tax deed that it is immaterial that the portion owned by the co-tenant is identified in his conveyance by a particular description."

Higgins, J., in *Plowman vs. Miller*, 27 S. W. (2nd) 612, said at p. 616: "Plowman * * * the plaintiff owns the other interest as a tenant in common, and as such had the right to maintain this action against a stranger to the title and recover upon the principle that one co-tenant can recover his own and the interest of his co-tenant as against strangers to the title. Under such circumstances, the defense of an outstanding title has no application. *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079; *Mealy*

v. Lipp, 16 Tex. Civ. App. 163, 40 S. W. 824; *Pilcher v. Kirk,* 60 Tex. 162; *Sowers v. Peterson,* 59 Tex. 216; *Boone v. Knox,* 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767, and other cases cited in 10 Michie's Digest, 1061-2."

What are tenants in common?

"*Tenants in Common*" are such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously.

2 Bl. Comm. 191; *Gould v. Subdistrict No. 3,* 8 Minn. 427, 431 (Gil. 382, 384); *Coster v. Lorillard,* (N. Y.) 14 Wend. 336; *Manhattan Real Estate & Building Ass'n. v. Cudlipp,* 80 N. Y. Supp. 993, 996, 80 App. Div. 532; *Taylor v. Millard,* 28 N. Y. St. Rep. 694, 695; *Taylor v. Millard,* 23 N. E. 376, 377, 118 N. Y. 244, 6 L. R. A. 667; *Griswold v. Johnson,* 5 Conn. 363, 365; *Silloway v. Brown,* 94 Mass. (12 Allen) 30, 36; *Gittings v. Worthington,* 6 Atl. 228, 233, 67 Md. 139; *O'Bryan v. Brown* (Tenn.) 48 S. W. 315, 316. There is no necessity for unity of interest. Tenants in common are such as have a unity of possession, but distinct and several titles to their shares. *Filton v. Vail* (N. Y.) 42 Hun. 638, 640. *The quantities of their estate may be different, the shares may be unequal,* the modes of acquisition of title may be unlike, and the only unity between them be that of possession. A remainderman may have a constructive possession sufficient to constitute the unity of the right of possession required to exist in a tenancy in common, and enable him to maintain an action for partition during the life of the life tenant. *Sullivan v. Sullivan,* (N. Y.) 4 Hun. 198, 200. Words and Phrases, Vol. 8, page 6908.

What is trespass?

"Every entry on land of another without lawful authority is a trespass, though it be only trodden, and whether the land be inclosed or not, and no matter whether any damage be done or not. The gist of the action is the wrongful entry. Whatever is done after that is but an

aggravation of damages. If a man's land be not inclosed the law encircles it with an imaginary inclosure, to pass which is to break and enter. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property. *Agnew v. Jones,* 23 South. 25, 26, 74 Miss. 347."

See Words and Phrases, Vol. 8, p. 7089, for the foregoing and other definitions. We do not find any applicable Texas definition. Texas cases defining "Trespass" deal with venue and jurisdiction.

It will be noted that while some of the cases cited use the expression "trespasser", Judge Gaines in *Boone vs. Knox, supra,* and Judge Higgins in *Plowman vs. Miller, supra,* use the expression "stranger to the title", so that whether or not the defendant is a trespasser, certainly if the Court decides that Plaintiffs have made out valid title, or that Defendant has failed to make out a valid title, in either event, the Defendant would be a stranger to the title, and each Plaintiff would have the right as a tenant in common to sue for and recover the entire tract.

If either side in this case is to be charged with lack of good faith, it cannot be the Plaintiffs; they acquired the property in the usual way; presumably they paid an adequate consideration, anyhow it was satisfactory to the seller; they had possession twenty-eight years, during which time no question as to the validity of their title was ever raised, and they always paid the taxes and otherwise complied with the Mexican Law. (R. 116.) On the other hand, the Defendant paid two hundred twenty-six pesos, six centavos for El Guayuco and El Calero bancos, with a total acreage of about four hundred thirty-five, or less than twenty cents an acre United States currency. (R. 286.) In other words, assuming that the defendant actually paid the consideration recited in the deed, if he loses this case, he will be out practically nothing, and

if he wins, the land will have cost him just about whatever it costs to defend this suit.

Mr. A. P. Coles testified that at the time of the trial of this case, the land in controversy had a fair market value of Twenty-five Dollars ($25.00) per acre, but that it had previously been worth much more, approximately One Hundred Dollars ($100.00) per acre. (R. 228.) It is a matter of common knowledge that land values were about at their peak at the time of the execution of the deed from the Governor of the State of Chihuahua to the defendant. It seems incredible that the Governor would have been willing to sell for less than $100.00, property worth approximately $40,000, if he had complete confidence in his ability to deliver good title.

The point made by the defendant that plaintiffs have sought remuneration from the International Claims Commission on account of the loss of their lands which still remain in Mexico, has no bearing on any issue involved in this case. We are not here seeking damages for unlawful detention or unlawful expropriation of our land. We are seeking the land itself. The land in question is now within the territorial jurisdiction of this Court, and it is within the jurisdiction of this Court to adjudicate its title. We claim that we now have title because when the land was in Mexico, we had title, and the title has never been ousted by a lawful expropriation proceeding or otherwise.

Every vestige of right that the defendant could possibly have in this proceeding rests wholly on the expropriation. If the expropriation was void, then defendant is a mere naked trespasser. If the defendant is a mere naked trespasser, then plaintiffs must prevail, upon a showing of prior possession.

Alexander vs. Gilliam, 39 Tex. 227;
Caplen vs. Drew, 54 Tex. 493;
Parker vs. Rwy. Co., 71 Tex. 133, 8 S. W. 541;
Boyd vs. Miller, 54 S. W. 411;
Lockett vs. Glenn, 65 S. W. 482;
Teagarden vs. Patten, 107 S. W. 909;
Frazer vs. Sureau, 128 S. W. 649;
Stuart vs. Harper, 143 S. W. 712;
Chicago, R. I & G. Ry. Co. vs. Johnson, 156 S. W. 253;
Allen vs. Vineyard, 212 S. W. 266;
Beason vs. Williams, 229 S. W. 963;
Williams vs. Chew, 19 S. W. (2nd) 68.

There can be no doubt about prior possession on the part of the plaintiffs. The trial court held that plaintiffs had record title to the land in controversy (R. 434). Under the law of Mexico record title constitutes possession. Art. 2983 of the Civil Code of Chihuahua reads thus:

> "If the thing sold is real estate, it is said to be delivered as soon as the title is executed, or if there is no writing, as soon as the titles to the estate are delivered." (R. 419.)

Record title in the plaintiffs endured from 1897 to 1925, a period of twenty-eight years, and all that time the plaintiffs paid the taxes on the land in controversy, surveyed it, and rented it, and exercised dominion over it, and had actual physical possession of the disputed realty, either personally or through their agents. (R. 110 and R. 205.) The Governor of Chihuahua in his expropriation proceeding recognized that plaintiffs had title and possession. (R. 254, 267.)

PLAINTIFFS PROVED VALID LEGAL TITLE TO THE PROPERTY IN CONTROVERSY.

It is the contention of the Plaintiffs that the trial Court found that the Plaintiffs had valid record title to the land in controversy at the time the Governor of the State of Chihuahua attempted to take it away from them through an expropriation proceeding. (R. 434.) That being so, and the Defendant having taken no cross appeal and having filed no cross-assignments of error, it seems to us that our title was free from attack, and therefore, requires no support. The Defendant contends, however, that the trial Court did not make such a finding, and therefore, our title is subject to attack and in his brief, * he attempted at some length to point out the alleged weaknesses in our title. If the District Court did not make such finding as we think it did, then we here contend, as we did in our assignment of errors (R. 441), that his failure to do so was reversible error, and without waiving any rights that might accrue to us by virtue of the finding on the part of the District Court that Plaintiffs had valid legal title to the property in controversy, we ask leave to answer the attack of the Defendant and support the title of the Plaintiffs.

The documents offered in evidence by the Plaintiffs appear to be valid and regular, and to constitute a complete and lawful chain of title to the land in controversy.

The Defendant makes the following objections (R. 18):

1. Defendant objects to Plaintiffs' Exhibits 4 and 5, being the Spanish document dated November 29, 1864, whereby the President of Mexico ratified in Laureano

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* In the Circuit Court of Appeals.

Munoz title of ownership of a tract of land called La Santisima, and the English translation thereof, respectively, on the grounds that:

a. It purports to be a confirmation of a title, but no grant of a title is shown.

b. There is no description in the instrument as would enable a person to locate the land under any circumstances.

c. It does not appear to have been executed with that mutuality which is required by the laws of Mexico, in passing title to land.

d. That the instrument itself refers to a title by virtue of an adjudication by the parties to whom it is addressed, and there is no evidence of such an adjudication or any means by which it could be located or established.

As the Defendant objects to all of Plaintiffs' conveyances on the ground of faulty description, it might be well, at this point, to show what the descriptions consist of. In the President's ratification of the concession for Laureano Munoz dated November 29, 1864, the description is:

> "Thirty-four sitios of Ganado Mayor (old land measure) situated on the right bank of the Bravo River from the old Presidio (fortress) up to the mines of the Presidio of Pilares." (R. 20.)

In the Deed from the heirs of Laureano Munoz to Ignacio Macmanus dated June 1, 1886, it is stated that it undertakes to:

> "Transfer by absolute sale and perpetual alienation, with all their uses, rights of way, water con-

> cessions and permanent rights or privileges, to Mr. Ignacio Macmanus the lands owned by them known under the name of "La Santisima", situated on the right bank of the Bravo River on a zone or belt of two leagues of latitude, from the Old Presidio to the ruins of the Pilares, commencing on the bank of the said river;" (R. 29.)

In the Deed dated December 6, 1886, executed in Mexico City, conveying La Santisima from Ignacio Macmanus to Bennett H. Davis, it is stated:

> "That likewise, the said Ignacio Macmanus is the owner of other lands of two leagues of latitude, with an area of one hundred four thousand four hundred twenty-four hectares, fifty seven ares, ninety-six centiares, on the right bank of the said Bravo river, which belt of land has at one extremity what is known as "Presidio Viejo" and at the other end the ruins of "Presidio de Pilares", which serves as a boundary for the land previously described and to which it joins (San Antonio) which is known as "La Santisima":" (R. 76.)

In the registration in Juarez, May 10, 1887, of the testimonio brought from Mexico City of the Deed from Ignacio Macmanus to Bennett H. Davis, dated December 6, 1886, appear the following descriptions:

> "By that contract Macmanus sold to Davis the Hacienda known as La Santisima located in Bravos District together with two other rural properties, which adjoin it and belong to Ojinaga District, all being on the right bank of the Bravo river." (R. 53.)

> "Which testimonio by agreement in its first clause only explains that the dimensions and boundaries of said La Santisima lands situated on the right bank of the Bravo river are on a belt of two leagues of latitude from the Old Presidio ~~as far~~ as the ruins of Pilares, commencing at the edge of the said river." (R. 56.)

This instrument also states that La Santisima was

> "measured by engineer William T. Glenn and Thomas T. Doyle, and found to contain one hundred four thousand four hundred twenty-four hectares, fifty-seven ares, and ninety-six centiares." (R. 57.)

The Deed from Bennett H. Davis to Shapleigh, Ranken and Peck executed in El Paso, Texas, February 13, 1897, protocolized in Juarez December 1, 1897, recorded in Juarez July 13, 1922, calls it La Santisima Grant, and describes it as "beginning at the upper river corner of said La Santisima grant", and then gives courses and distances around the tract, stating that 32-2/5 100 parts containing ninety-five thousand two hundred and four acres of land conveyed, located on the west bank of the Rio Grande in the Bravos Canton of the State of Chihuahua, Mexico. (R. 119.)

In the confirmatory Deed by which Ignacio Macmanus conveys to Bennett H. Davis, executed in Los Angeles January 2, 1924, protocolized in the City of Chihuahua March 4, 1924, inscribed in the public registry of property in Juarez, June 13, 1924, it is stated that La Santisima has an area of one hundred eighteen thousand eight hundred ninety one hectares, and describes the property by metes and bounds, and gives the names of the owners of the contiguous property. (R. 98.)

Mr. Gilbert Valenzuela, a Mexican lawyer of wide experience in prominent positions with the Government of Mexico, as well as in the actual practice of law in Mexico, testified that the confirmation by the President of the Republic of Mexico in 1864 of the concession to Laureano Munoz by the Legislature of the State of Chihuahua in 1859 was valid and effective as a muniment of title, because, under the theory prevailing in Mexico, all land belonged to the Crown of Spain prior to the separa-

tion, and afterwards to the Mexican nation, so that it was the confirmation by the President and not the concession by the Legislature that was really effective in passing the title. (R. 22.)

Mr. Valenzuela further testified that (R. 24, 43, 108, 245) the description in each of Plaintiffs' conveyances was sufficient, according to the custom and usage in Mexico. That opinion seemed reasonable, especially with reference to the document now under consideration.

In 1864, affairs in Mexico were in a precarious condition. The country was sparsely settled, methods of communication were crude, and the lands were of little value. Under the circumstances, the description given was doubtless the best that could be given, and was all that was needed. It seemed to satisfy the parties. If anyone else was injured, the Courts were open to him. It does not appear that any of the conveyances in Plaintiffs' chain of title were ever attacked for faulty description or for any other reason.

The confirmation by the President in 1864 of the legislative grant puts the tract on the Rio Grande, gives the area, and marks the ends. From that the width could easily be determined, which would render the property locatable upon the ground. Each successive conveyance improved the description, and many years before the Defendant had even an apparent interest in the tract, it was described by metes and bounds. (The Defendant could not have had a shadow of an interest in the property before 1925, we think not before 1930, and it was described by metes and bounds in the Deed from Davis to Shapleigh, et al, in 1897.) Even if there were a fatal defect in the paper title of the Plaintiffs, which we do not admit, but expressly deny, title by prescription was

twice perfected before the Defendant came into the picture—between 1864 and 1886, while the Muñoz family had possession, and between 1897 and 1925, while the present owners had possession. In addition, Bennett H. Davis doubtless perfected title by prescription when he had possession in good faith from 1886 to 1897. Moreover, the Defendant is estopped to question the validity of the title of the Plaintiffs because all Defendant's rights are derived from the Decree of Expropriation, and it admits title in Plaintiffs.

Apparently Defendant has not much faith in the particular objection now under consideration, namely, faulty description, because neither of his experts in Mexican law, who both testified at great length, said a word in support thereof.

In support of his contention that the description in the various instruments are sufficient, Mr. Valenzuela cites Articles 2730 and 2731 of the Civil Code of Chihuahua. (R. 427.) It occurs to us this bolster is unnecessary, since, as heretofore shown, the descriptions given are sufficient to render the tracts locatable on the ground.

As to the alleged lack of mutuality of consent complained of by the Defendant with reference to the particular instrument here under consideration, namely, Plaintiffs' Exhibit No. 4, being the President's confirmation of the original grant, Mr. Valenzuela says (R. 45) there is a distinction between a contract with the Government and a contract with another person, and when the Government grants a title to a person no acceptance is needed. As to the necessity in general for mutuality in contracts under the Mexico law, Mr. Valenzuela says (R. 132) that under the old law there were three essentials to the validity of a contract: capacity of the con-

tracting parties, mutual consent, and legality of object or purpose; and the new law added a fourth: that the contract shall be executed with the external forms required by law. He further says, however, that no formality is required. The essentials must be in the contract itself and not necessarily in the language expressing it, and he says in effect that a contract appearing on its face to be valid, stands until overturned at the instance of an objector, which is the rule in the United States, is certainly a wholesome doctrine, and is probably the law in all civilized nations.

Defendant contends (R. 71) that the deed from Ignacio Macmanus dated December 6, 1886, to Bennett H. Davis, conveyed no title, for two reasons: (1), "that it must be accompanied by a particular description of the land and a map showing the lands sought to be claimed or held under the instrument, and no such map accompanied the instrument, and no map appears on the record thereof;" and, (2), "that the instrument was first tendered for record in 1924, after the adoption of the Constitution of 1917, and after the promulgation of the organic law putting Article 27 of the General Constitution into effect, and after the adoption of the Agrarian Law by the State of Chihuahua." These points will be taken up in order.

It is a rule of law of universal application that a substantial compliance with the terms of a contract is sufficient. No Mexican statute or regulation has been produced which requires a literal compliance with the terms of a contract. Mr. Gilberto Valenzuela, Plaintiffs' expert in Mexican law, says that the deed in question is valid and gives his reason for that opinion at great length. (R. 84.) In 1897, eleven years after the execution of the deed in question, the same land thereby conveyed was again conveyed by the grantee by metes and bounds. Dur-

ing that time the validity of the transfer was not questioned. It seems to us that the grantor would have been estopped to question the validity of the deed of 1886, and the grantee ratified it by holding the land for eleven years under said deed, and then conveying the title thereby acquired. Under the Mexican law, nobody except the parties to the instrument could have questioned its validity. Article 1788 of the Civil Code of the State of Chihuahua extant at the time of the execution of the deed of 1886 herein questioned, reads as follows:

> "The action and the defense of nullity belong to the principal parties and to their sureties, excepting those cases in which the law expressly provides otherwise."

Moreover, there was specific ratification by the parties of the deed here in question. The deed executed in Los Angeles, California, January 2, 1924, by Ignacio Macmanus describes the property therein conveyed by metes and bounds and has attached to it maps of the land conveyed (R. 95), and recites that it is in confirmation of the deed of 1886. (R. 98.) By this instrument Ignacio Macmanus, the grantor in the previous instrument, and Shapleigh, Ranken and Peck, successors in title to Bennett H. Davis, grantee in the previous instrument, ratified and confirmed the deed of 1886. Meanwhile, its validity was never questioned.

The Agrarian Law quoted in Defendant's brief, shows on its face that it has no application whatever to the instrument here in question, nor to any other instrument involved in this case. Article 53 of the Agrarian Law begins thus (R. 345):

> "Every transfer of ownership of land which may be made after the promulgation of this law and by virtue thereof * * *"

It could hardly be made more clear that it was the intention of the framers of the Agrarian Law that it should not be retroactive, and that its application should be confined to instruments executed after the date of the Agrarian Law, and made in pursuance of the provisions thereof. Even if, by some stretch of the imagination, it could be conceived that the transfer of ownership of the property here involved took place in 1924 after the promulgation of the Agrarian Law because of the ratification in that year, certainly the transfer of ownership did not take place "by virtue thereof", and the two must concur in order to make the Agrarian Law applicable. The deed of 1886 from Macmanus to Davis was complete in itself, and perfect under the Mexican law. It merely left something undone (the filing of maps and a more complete description) which the grantee might call on the grantor to do if he saw fit. That the transfer of ownership took place in 1886, thirty-eight years before the passage of the Agrarian Law, is evidenced by the fact that the grantee took possession and after holding possession eleven years, in 1897 he conveyed the same land to Shapleigh, Ranken and Peck, and the grantor acquiesced therein. Since the grantee in the deed of 1886, after holding the land eleven years, made a conveyance of it to others, who thereafter held the land as long as they could, it must be assumed that said grantee, either by himself or an agent, took whatever possession of the land was necessary to make his title valid, if any such was necessary. Article 2717 of the Code of Chihuahua of 1898 is as follows (R. 426):

> "If the thing sold is real estate, it is considered as having been delivered from the moment of the execution of the deed of conveyance, and if this should not be necessary, as soon as the respective private contract is executed."

Defendant further contends that the deed from Bennett H. Davis to Shapleigh, Ranken and Peck, dated February 13, 1897, is invalid for the reason that: (a) It shows lack of mutuality because not executed by the grantees; (b) It does not show the capacity of the grantees; and (c) It was not registered until after the promulgation of the Agrarian Law.

It seems clear to us that the law of Mexico quoted in Defendant's brief shows, on its face, that the deed in question is in compliance therewith (R. 402.) Article 13 says that with regard to Mexican land, Mexican laws shall govern. Article 14 says that with regard to the form or external solemnities of public instruments, the law of the country where executed shall govern. There is no conflict between the two. Article 13 does not purport to apply to public instruments. Article 14 applies to nothing else. It should also be observed that Article 14 applies to all public instruments, and is not confined in its operation to instruments relating to either realty or personalty, but applies to both. Article 17 says that if the public instrument should have been executed by a foreigner, to be carried into effect in Chihuahua the maker may elect as to the law to which the internal solemnity of the act shall be subject insofar as concerns personal property; with regard to real property Article 13 shall be observed. There is no conflict between this article and either of the other two. The operation of this article is confined to internal solemnities and the operation of Article 14 is confined to external solemnities, so that as to the external solemnities of a contract, the provisions of Article 14 govern, whether the contract refers to personal property or real property, and provides that it may conform to the law of the country where executed. The resulting Mexican law is that an instrument valid

where drawn is valid in Mexico. The language of the statutes is so clear it is not susceptible of any other meaning.

If confirmation be needed, we refer to Mr. Valenzuela's testimony (R. 388). His opinion coincides with that of a celebrated disinterested witness:

> Volume 1, Verdugo's Commentaries on Mexican Civil Law, page 117, paragraph 157, reading as follows:
>
> "157. The form and external solemnities of contracts, wills and all public documents are governed by the law of the country in which such acts are performed, according to Article 14 of the Code of the Federal District, which corresponds to Article 11 of the Code of the State of Veracruz and to Article 10 of the State of Mexico.
>
> " 'A principle of law now generaly accepted,' says Foelix, 'is that the manner of performing acts is governed by the laws of the place in which said acts are performed or documents executed.'
>
> "In other words in order for a juridical act to be valid it is sufficient to observe the form prescribed by the law of the place where the act is performed or the document formulated. The act thus performed is legal and binding with respect to personal property or real estate situated in another country, although the laws of the other country prescribe formalities different from those of the place where the act is performed.
>
> "Such is the sense of the ancient maxim *'locus regit actum'*. The jurisprudence of all countries is in accord with the principle here announced, although not all of the codes are explicit with reference thereto."

Verdugo is one of the notable and accredited commen-

tators on Mexican Civil Law. Foelix is a notable French author of high repute and world renown.

In support of the principle above set out, Verdugo cites the provisions of the Roman Digest of Justinian, of the First and Fourth Partidas of the Spanish Code, the Civil Code of Italy, Civil Code of Holland, Civil Code of Chile, the Portugese Civil Code and the Code of the State of Louisiana.

Defendant in his brief, page 11, says:

> "It would be strange indeed if the law in the State of Chihuahua did not govern transfers of real estate situated within that sovereignty."

He then cites many authorities in support of that proposition. There has never been any disagreement between us on that point. The Chihuahua law does govern and, as heretofore clearly pointed out, provides that a transfer valid where drawn is valid in Mexico.

Defendant cites the Act of Chihuahua of 1856 in support of his contention that no foreigner could own land in Mexico without previous permit. The Mexican Constitution of 1857 was in force when the deed from Bennett H. Davis to Shapleigh, Ranken and Peck was executed February 13, 1897. It authorizes ownership of land in Mexico by foreigners without permit, and was therefore in conflict with the Act of 1856 which was repealed by it.

Defendant also makes the proposition that Plaintiffs' exhibits 20 to 28 were inadmissible because not registered. (R. 114.) These exhibits consist of the will of Charles H. Peck and the proceedings thereunder, and other instruments showing that the plaintiffs other than A. L. Shapleigh are the owners of the interests formerly

owned by Charles H. Peck and Thomas Ranken, Jr. It is our contention that A. L. Shapleigh, Charles H. Peck, and Thomas Ranken, Jr., in February, 1897, by deed from Bennett H. Davis, acquired, and afterwards held La Santisima as tenants in common; that El Guayuco was cut from La Santisima; that since said banco is now in the United States, the rights of the parties are governed by the laws of Texas; that under the law of Texas, one tenant in common may sue for and recover the entire tract; that the rights of A. L. Shapleigh are dependent on the deed of 1897 and are not affected by any heirship proceedings that might have been brought in Mexico by the heirs of Charles H. Peck and Thomas Ranken, Jr.

The Defendant, in his brief, on page 24 says that it appears to be irrelevant to discuss the abstract proposition of law involved in Plaintiffs' proposition that Shapleigh, as a tenant in common, has the right to recover the whole of the land, and then calls attention to the fact that in the deed to Shapleigh, Ranken and Peck, a definite fraction of the entire tract was conveyed to each of the three grantees. Under our law, a tenant in common may recover the entire tract, no matter how definite the description of his holding, provided there has been no partition. (*Sullivan vs. Sullivan,* N. Y. 4 Hun. 198, 200; *Words and Phrases,* Vol. 8 page 6908.)

Several times in his brief, Defendant says that the Governor of the State of Chihuahua found in his decree of expropriation, dated March 5, 1925, that Shapleigh, Ranken and Peck did not have title to La Santisima. It is difficult for us to believe that the Defendant could have read the decree and still make the statement that he does. It seems to us that almost exactly the opposite is true. A cursory reading of the decree (R. 253) would

show that it is little short of a specific finding that valid title was in Shapleigh, Ranken and Peck. In the preamble to the decree, the Governor recites that a memorial has been filed denouncing a latifundium composed of certain tracts of land which he describes, among them La Santisima, and then says (R. 254):

> "and concerning which lands, Thomas Ranken, Jr., Charles H. Peck, Alfred L. Shapleigh, Charles Davis and John J. O'Fallon *appear to be the owners.*"

Thereafter, no less than eighteen times in the decree the Governor refers to the owners in such a way as to clearly indicate that he has in mind as owners the people named in the preamble, and in the concluding part of the decree the said latifundium is expropriated from the five men mentioned in the preamble and from the Rio Bravo Land and Cattle Company. Nowhere in the decree is there a finding that Shapleigh, Ranken and Peck are not the owners of La Santisima. The most that can be said is that possibly a doubt is expressed, but in view of the fact that the land is expropriated from them there could hardly be any doubt in the mind of the Governor that they were the owners, and he clearly intimates from time to time through the decree that such is his opinion.

In this connection, we submit a thought which may or may not have any bearing on any issue in this case, but which seems to us very curious. If, as is contended by the Defendant, the Agrarian Law of the State of Chihuahua was contitutional and valid, and the Governor needed no authority to expropriate La Santisima except that it was too big for three men to hold, then why was it necessary for the Governor to make extensive findings as to the failure of Shapleigh, Ranken and Peck to comply with his orders, and why all the caustic comments in the

brief of the Defendant about the alleged contempt with which it is said the Plaintiffs treated the requests of the Governor. If the Agrarian Law is valid, then the Governor needed to make but two findings: That La Santisima was too big for three men to hold, and they had been ordered to divide it and refused. The whole proposition savors of an attempt by the Mexican authorities to jockey the Plaintiffs into a position where it would appear that the American owners had failed to comply with reasonable requests on the part of the Governor and therefore had forfeited their rights under the Mexican law.

The Defendant says (Brief 25) that our plea of limitation is bad because there is no evidence of possession, and if we had possession it was for less than twenty years, and he further says that we failed to plead the Mexican ten-year statute of limitation. In all these things, of course, we are very confident that the Defendant is mistaken. Since the land is now in the United States and in Texas, the pleading of limitation is governed by the laws of Texas. Under the law of Texas, limitation can be proved by the plaintiff without being pleaded. (*Reynolds vs. Lansford,* 16 Tex. 286; *M. K. & T. Ry. Co. vs. Wickham,* 44 S. W. 1023; *Benavides vs. Molino,* 60 S. W. 260; Writ of Error Denied, 60 S. W. 875; *Berry vs. Jagoe,* 100 S. W. 815; *Allen vs. Allen,* 105 S. W. 53; *Tillman vs. Erp,* 121 S. W. 547.)

However, we think the ten-year statute well pleaded. Certainly it was fully set out in Plaintiffs' abstract, and that would admit any necessary proof.

The eighth paragraph of Plaintiffs' Second Amended Original Petition, on which we went to trial, is as follows:

> "Plaintiffs further allege that they have had more than twenty years' possession of the land in controversy, founded on a just title in good faith, peaceful, continuous and public, and therefore they are vested with valid title by limitation to said land under the provisions of Articles 1065 et seq. (particularly Articles 1085 and 1092) of the Civil Code of the State of Chihuahua, Mexico."

Article 1092 of the Civil Code of the State of Chihuahua, Mexico, is as follows:

> "All real estate properties are subject to a limitation in good faith in ten years, and in twenty years in bad faith subject to the exceptions set forth in Article 1076."

As we pleaded good faith, the twenty years' possession pleaded would include any lesser term of possession, such as ten years necessary to establish limitation in good faith. Defendant apparently assumes that Plaintiffs must have lived on the land in question in order to prove possession. There is no warrant for such an assumption. The true owner is deemed to be in possession of land not in the adverse possession of another. (20 C. J. 248). The true owner in this case must be deemed to have been the Plaintiffs since they had the record title and there is not a scintilla of evidence of adverse possession on the part of anyone except the holder of the record title at any time within the scope of this controversy beginning in 1859, and running down to date, and there is abundant testimony that the holders of the record title at all times had possession of the property in controversy, either through themselves or their agents. In this connection, Articles 919 and 2983 of the Code of Chihuahua are significant:

> "Article 919. Possession is the tenancy of a

thing or the enjoyment of a right by ourselves or by another in our name." (R. 403.)

"Article 2983. If the thing sold is real estate, it is said to be delivered as soon as the conveyance is executed, or if there is no writing, as soon as the titles to the estate are delivered." (R. 419.)

In support of their plea of limitation, Plaintiffs called the following witnesses:

A. P. Coles, who testified that he had been in the real estate business in El Paso, Texas, since 1888, that he was personally acquainted with A. L. Shapleigh, Charles H. Peck and Thomas Ranken, Jr., and they had all three been in his office in El Paso, Texas. That he knew about the purchase of La Santisima in February, 1897, having known and represented the purchasers or some of them prior to that transaction, and he represented all three of the purchasers as long as they had possession of La Santisima. That he paid all the taxes required by the Mexican Government on said tract of land from 1898 until about 1927; that as agent for Shapleigh, Ranken and Peck, he employed Manuel L. Cardona to survey La Santisima, and they paid him for the work, and he paid Cardona. That Cardona delivered to the witness Map of La Santisima which he sent to Mr. Shapleigh. That Cardona was also employed to lease the land and remove squatters, both of which he tried to do. (R. 109.)

Manuel L. Cardona (R. 205), who testified that he was a Mexican engineer, formerly maintaining offices both in El Paso and Juarez. That in 1923 about March or April, at the instance of A. P. Coles, he surveyed La Santisima for Shapleigh, Ranken, and Peck, and they paid him for that service, as well as for other services subsequently rendered; that under Powers of Attorney received from the owners in 1924, which were offered in

evidence, he endeavored to lease La Santísima to tenants. That he interested many prospective tenants, but was unable to do business with them for the reason that they were unable to agree on the terms of a lease contract. That the purpose of the survey was to comply with the Agrarian Law of Chihuahua, and after completing the map, it was delivered to Mr. Delbert J. Haff, attorney for the owners. That as employee of Shapleigh, Ranken and Peck, the witness went with Mr. Haff to Chihuahua for the purpose of endeavoring to comply with the Agrarian Law.

Mr. Cardona further testified that he had been on La Santisima tract from time to time and that he used to go thereon every two or three months. Thus it is well established that Plaintiffs exercised dominion and control over the land in controversy and had actual physical possession of it either by themselves or through their agents from 1897 to 1925, a period of twenty-eight years.

Moreover, it seems clear from the testimony of Mr. Valenzuela that title by prescription in Mexico matures upon less intimacy with the soil than is required in the United States. (R. 244.)

With further reference to the question of limitation, the Defendant claims that the Plaintiffs in this case are not entitled to the benefit of the ten-year statute, and they never had twenty years possession, the contention being that possession did not begin until the permit was obtained August 25, 1897, and twenty years had not elapsed after that date until the Constitution of 1917 went into effect May 1 of that year. We have several answers, either one of which we think is complete.

In the first place, as stated many times by the Defendant in his brief, possession is a question of fact, and un-

der the facts and under the peculiar wording of the Mexican statute heretofore pointed out, upon the execution of the conveyance from Bennett H. Davis to Shapleigh, Ranken and Peck, February 13, 1897, there was a delivery and a going into possession, whether or not any of the grantees actually trod the dirt, and their possession began February 13, 1897, and when the permit was obtained August 25th of that year, it was merely confirmatory of their right of possession. If their possession began February 13, 1897, then the twenty years' limitation period had been completed before the Constitution of 1917 went into effect May 1st. Moreover, there is nothing in the Constitution of 1917 which made retroactive the inhibition against foreigners holding land in the prohibited zone, and in the absence of a specific provision to that effect, vested rights, such as Shapleigh, Ranken and Peck had been enjoying would not be extinguished, and their possession necessary to create limitation would continue. But, if the Court should entertain any doubt about this point, we still think that our possession necessary for prescription would not stop May 1st, 1917, when the Constitution of 1917 was adopted, for the reason that the provision as to inhibition of foreigners holding land in the prohibited zone was not self-executing and the organic law necessary to put it into effect was not adopted until December 31, 1925, and Plaintiffs' possession necessary to prescription would have continued until at least that date, if it really ever stopped, according to the provisions of the Constitutions of 1917.

Moreover, in claiming title by prescription, it is quite clear that under the Mexican law, Shapleigh, Ranken and Peck are entitled to take into consideration the eleven years' possession had by their predecessor in title, Bennett H. Davis, from 1886 to 1897. The point is con-

trolled by Article 1185 of the Code of Chihuahua, reading as follows:

> "Article 1185. He who prescribes may complete the necessary terms for his prescription, by uniting with the time which he may have possessed that which the person who transmitted the thing to him possessed, provided that both possessions have the legal requisites."

With further reference to the validity of the deed from Bennett H. Davis to Shapleigh, Ranken and Peck, conveying La Santisima, executed in El Paso, Texas, February 13, 1897, the attention of the Court is called to the following authority:

> Halleck, International Law, Vol. 1, page 199. "By the rules of International Jurisprudence recognized among the different nations of the European continent, as the *lex loci rei sitae* allows the property to be alienated by deed or will and does not require forms to be necessarily observed in the place where it is situated, the deed or will may be executed according to the law of the place where it is made, but the application of the rule is less liberal in Great Britain than in the United States, the formalities required by the laws of the states where the land lies being essential to the validity of the transfer."

Mexico, being a civil law country, would naturally follow the European rule.

In their criticism of the muniments of title of the Plaintiffs, the Defendant and his two experts lose sight of two doctrines that are well established in the law of Mexico, namely, that only parties to an instrument or a transaction can question its validity, and that in the absence of any question being raised, the document or transaction becomes ratified in due course. The applicable pro-

visions of the Civil Code of Chihuahua of 1898 are as follows (425, 426):

ARTICLE 1543:

The right to declare a contract void exists between the parties thereto and their bondsmen, excepting therefrom such cases as are expressly made and provided by law.

ARTICLE 1547:

The voluntary compliance with a contract by means of payment, renewal or any other act performed under the same circumstances, shall be considered a ratification thereof and thereafter it cannot be attacked as being void.

ARTICLE 1548:

The ratification and voluntary compliance with an obligation which is void by reason of lack of formality in whatever time the same may be made, extinguishes the right to have the same declared void, excepting therefrom such cases as are by law expressly provided.

The philosophy of interpretation of the experts of the Defendant is so rigid, and therefore, brutal, it leads to the suspicion that their judgment is overridden by their zeal. Mr. Miranda in his interpretations adhered literally to the precise text of the statutes and required of the Plaintiffs meticulous compliance with each and every provision thereof, and Mr. Castillo was almost as inflexible. In that attitude, they not only failed to follow their own jurisprudence, but they acted in direct violation of many rules of construction that prevail throughout the civilized world, such as that unless otherwise provided therein a substantial compliance with the terms of a contract is sufficient, and unless otherwise stated therein, time is not of the essence of a contract.

While we have endeavored to fully answer the attack

of the Defendant on the Plaintiffs' title, we still believe that we were not obliged to do so, and that such title is not subject to attack. It is difficult to treat seriously the contention of the Defendant that because the Trial Court qualified his finding to the effect that the Plaintiffs had valid legal title with the preface "if necessary", it did not amount to a finding because not necessary. Whether necessary or not, the fact remains that the Court did make a finding that the Plaintiffs had valid legal title to the lands in controversy, and to contend otherwise takes from legal proceedings that dignity and confidence that they are always entitled to receive. That a finding of fact not excepted to, cannot be reviewed on appeal is so elementary in Texas procedure as to scarcely justify citation of authority. *First National Bank vs. South Beaumont Land & Imp. Co.*, 128 S. W. 436; *Gulf C. & S. F. Ry. Co. vs. Clement Grain Co.*, 268 F. 535.

In this connection we further call the Court's attention to the fact that the Plaintiffs were the common source of title in this case, and it is also elementary in the law of trespass to try title in Texas that a junior title holder cannot question the validity of title of a common source. The expropriation proceeding, if valid, vested in the Governor of Chihuahua only that title which had formerly been in the Plaintiffs and since the title of the Defendant rests wholly on the validity of the expropriation proceeding, if the Plaintiffs never had title, the Governor of Chihuahua never got title, and the Defendant never took title. That would make the Defendant a mere naked trespasser and would entitle the Plaintiffs to recover on a showing of prior possession, which has been abundantly made out. *Evans vs. Foster*, 79 Tex. 48, 15 S. W. 170; *Branch vs. Daussen*, 108 S. W. 164.

The record in this case is in shape for this Court to

pass on every issue involved. A jury was waived. The District Court filed a memorandum opinion, entered a judgment, and later filed findings of fact and conclusions of law. All the rulings of the Court in the progress of the trial of the cause that were against the interests of the plaintiffs to-wit: the rulings admitting in evidence the alleged muniments of title of the defendant, were excepted to at the time and duly presented by a bill of exceptions and may be reviewed upon appeal. There is no Statute or rule of Court requiring such rulings to be assigned as error. It was contended by the plaintiffs that the muniments of title of the defendant were null and void and of no force or effect, and the action of the Court in upholding their validity was assigned as error, and if they were invalid of course they were not admissible in evidence for any purpose. In other words, when we assign as error the holding by the Trial Court that the instruments were valid, the assignment and the error necessarily include the collateral error committed in admitting invalid instruments.

The wholesomeness of the Mexican Agrarian Law and the expropriation proceeding thereunder has no bearing on any issue in this case, and is no concern of the courts. The question is whether the Mexicans tracked the law in plundering the plaintiffs. So far as sympathy is concerned, at least as much could be said for the plaintiffs as for the defendant, if it had any proper place in this proceeding. There is nothing in the record to indicate that the plaintiffs did not acquire the land in controversy in a lawful manner and for an adequate consideration, and they certainly lost it through a species of governmental theft.

CONCLUSION.

The uncontradicted evidence shows that plaintiffs were never paid for their land. All the law, international and municipal, organic and judicial, shows that plaintiffs cannot be deprived of their title until they are paid. Also, the Agrarian Law was unconstitutional, the expropriation proceedings thereunder by which it was attempted to deprive the plaintiffs of their land were irregular and beyond the powers of the Governor. Besides, the land in controversy was in the United States at the time the Governor of Chihuahua attempted to convey it to the defendant, which makes of the defendant a naked trespasser, and entitled plaintiffs to recover on a mere showing of prior possession. The trial court held that the plaintiffs were vested with valid legal title to the realty in suit at the beginning of the expropriation proceeding and each plaintiff sues as a tenant in common for the entire tract. Therefore, the judgment in favor of the defendant should be reversed and judgment here entered in favor of the plaintiffs.

Respectfully submitted,

J. F. McKENZIE,
H. R. GAMBLE,
Attorneys for Petitioners.

APPENDIX

APPENDIX.

"TRANSLATION"

ADMINISTRATIVE AMPARO, UNDER REVISION.

• • • •

District Court of Durango.

PLAINTIFF: Pastor Moncada widow of Blanco Teodora.

DEFENDANT: The Legislature and the Governor of the State of Durango.

GUARANTEES DEMANDED: Articles 14, 16 and 27 of the Federal Constitution.

ACTS COMPLAINED OF: Decree of December 4, 1917, issued by the Legislature, and the promulgation of the same made by the Governor.

Application of Article 27 of the Constitution, and interpretation of Art. 115 of the Magna Charta.

(The Supreme Court confirms the decision of the District Judge who granted the amparo.)

Summary.

LOCAL LEGISLATURES—Upon the Constitution establishing that these will have to be formed, at least, by 15 deputies, it does not refer to the quorum that the same requires to be legally constituted, but to the number of representatives belonging thereto; therefore, if calls have been sent out for the election of 15 deputies, and only those absolutely necessary have been elected to form a quorum according to law, the functioning of the Legislature cannot be objected as anti-constitutional.

EXPROPRIATION—This can only be made by reason of public utility and by paying indemnity.

INDEMNITY—Although Article 27 of the Constitution does not require previous indemnity, it does not either state that it will be left in abeyance, and it is therefore to be inferred that the indemnity will have to be simultaneous with the expropriation.

Even though it should be postponed, it is evident that it would have to be guaranteed in a precise, real and positive manner, since otherwise the expropriation would be equivalent to a despoliation.

DECREE OF DECEMBER 4, 1917, ISSUED BY THE STATE OF DURANGO: Not specifyiny anything in respect to indemnity for carrying to a head the expropriation, it is on that account in violation of Article 27 of the Constitution.

Mexico, July 5th, 1920. *Unanimous resolution.*

The suit of amparo, promoted by Teodora Pastor Moncada, widow of Blanco, before the District Judge of Durango, vs. acts of the Legislature and of the Governor of said State, for violation of Articles 14, 16 and 27 of the Constitution, having been reviewed, and

Resulting:

That the amparo suit states: that the Legislature of Durango, by decree of December 4, 1917, erected into a free town, by the name of "Villa Guadalupe Victoria" the hacienda de Tapona, owned by the plaintiff, who by the same decree, was expropriated of some of the buildings of said hacienda, of the ground on which the said buildings rest, and of one square kilometer of ground

intended for the town-site of the new village; that the Governor enacted, to be enforced, the decree to which reference has been made, and that, considering that these acts are in violation of the constitutional guarantees above mentioned, an amparo is requested against the same from Federal Justice.

Considering:

First: That the first part of the complaint is made to consist of the fact that the Legislature of Durango is composed only of twelve deputies, eleven proprietary, and one substitute, while Article 115 of Constitution provides that the local Legislature should be formed, at least, by fifteen proprietary deputies; it is to be assumed therefore, that the functioning of said Legislature being anti-constitutional, the decree subject matter of the complaint is void, and in it are violated the guarantees granted by Article 16, since the trouble and annoyance caused to the complaint have no legal basis. The interpretation being given to Article 115 of the Constitution is wrong, inasmuch as said precept, in establishing that the local Legislatures will have to be formed at least, by fifteen deputies, does not refer to the quorum needed by the same to function legally, but to the number of representatives that should belong to it; so that when calls have been sent out for the election of fifteen deputies, (as it appears from the files that was done in the State of Durango,) Article 115 already mentioned has been complied with; and the fact that in some districts elections could not take place, nor that for this reason the number of fifteen deputies was not completed, is an obstacle for the Legislature to be able to function legally, if for that purpose it counts with the quorum required

by law. There does not exist therefore, such violation of guarantees which are claimed for.

Second: The second point of the complaint is made to consist of the fact an expropriation is tried to be made against the plaintiff, without payment of the indemnity referred to by Article 27 of the Federal Constitution. It is true that this Article provides that the expropriation can only be made by reason of public utility, and through indemnity. In what respects to this last requirement, it should be said that, *even although Article 27 does not require previous indemnity, it does not provide that it can be postponed;* hence logically and juridically speaking it must be inferred that the *expropriation and indemnization should be simultaneous;* and even in the wrong supposition that the latter could be postponed, it it evident that it had to be guaranteed in a precise, real and positive manner, since without these requirements, such expropriation would amount to despoliation, and our Magna Charta does not authorize such an outrage. Now well, as the decree on which the complaint is based does not order that the indemnity should be previous, nor simultaneous, and does not even establish the form in which it should be covered or guaranteed, as this is subject to the stipulations of a future enactment, it is evident that said decree violates, for this reason, Article 27 of the Constitution; and therefore, it is proper to concede the ampara as requested.

For the above considerations, and not for those set forth by the District Judge in his resolution, it is resolved:

First: The resolution of March 18th, 1918, is hereby confirmed, by which the District Judge of Durango granted to Teodora Pastor Moncada viuda de Blanco, the

amparo requested against acts of the Legislature and of the Governor of said State, consisting, in what respects to the former, in the issuance of decree number 25, of December 4th, 1917, to which reference has been made; and, in respect to the latter, in the promulgation of said decree, for its compliance.

Second: Let notice be given; let publication be made; with certified copy of this resolution, returning the records to the court of their origin and in due time let the "Toca" be filed in the archives.

Thus decreed the Supreme Court of Justice of the Nation by unanimous vote, in relation to the result of the decision and by majority of six votes with relation to the basis or reason upon which the same is founded. Minister Urdapilleta and President Moreno granted the amparo, both for the reason that it is pretended to expropriate the plaintiff without paying her any indemnity, as well as because it is pretended to carry on said expropriation without existing therefor a reason of public utility; Minister Sabido granted it for the fact that the expropriation may have been decreed, without previously, there having been issued in the State of Durango, the law to determine in which cases the occupation of private property is for public utility, as provided by Article 27 of the Constiution. Ministers Alcocer and Gonzalez were not present at the meeting. The following citizens set their hand and seal, with the Secretary who attests: Enrique Moreno, Adolfo Arias, Benito Flores, Ignacio Noris, Patricio Sabido, Agtn Urdapilleta, E. Garza Perez, Gustavo A. Vicencio, Jose M. Mena, F. Parada Gay, Secretary.